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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1972
NO. ———

CHARLES ETTA COX ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The facts in this case are straightforwardly presented by the record. It appears that on September 1, 1970, Olga Winkle was in a beauty shop near her place of business, Olga's Fabrics and Fashions, when she observed three black ladies of varying ages, one pregnant, all carrying shopping bags, enter an old white Mercury automobile with a black interior parked in front of the beauty shop. Mrs. Winkle identified the petitioner at trial as one of the black ladies carrying a bag and entering the car. She also identified petitioner as the driver of the car. When she returned to

her shop a short time later, she was informed by Barbara Pruitt, an employee, that certain merchandise was missing from the store and had been discovered missing after the entrance and departure of three black females who were in the store approximately twenty minutes and who purchased nothing while there. Mrs. Pruitt also identified petitioner as being one of the three black women.

Barbara Bradshaw, the owner of the Barbara's Beauty Shop and the lady who was attending to Mrs. Winkle's hair, briefly testified that she had also seen a red and white 1955 or 1956 Mercury automobile parked in front of her store while Mrs. Winkle was there. She saw three black ladies approach the car and leave soon afterwards. She did not see these three people again, and could not identify petitioner during trial.

Deputy A. J. Pitts, testified that he received information over the telephone from Olga Winkle that some merchandise had been discovered missing from her store. He likewise received information from the same source as to the type of car believed to be involved, a 1953 or 1954 Mercury automobile, and he was also given a description of the occupants of the automobile (T. 78).

Arkansas State Police Trooper James Hale testified that he received a call from Deputy Sheriff Pitts informing him of the theft from Olga's Fabric and Fashion Center and describing the automobile involved. He was also given a description of the occupants by Sheriff Pitts. Between 5 and 6 p.m. the same evening, he detained a car of the same description, occupied by the petitioner, who was driving, and two other black females. Upon looking into the vehicle he observed two cloth type sacks on the floorboard, more or less in front of the passenger in the front seat. The

sacks were open at the top and he ascertained they contained clothing. The content of the sacks was visible from his viewpoint from outside of the automobile.

He subsequently had the petitioner drive the car to Mrs. Winkle's store, which was closed. He then had petitioner drive to the nearby Sheriff's office where the sacks were removed from the automobile, taken into the police station, and emptied. Olga Winkle, who was at the police station, immediately identified some of the articles contained in the sacks as belonging to her.

The defense offered no testimony.

QUESTION PRESENTED

The warrantless search and seizure conducted by the police officer was reasonable and legal under the "Plain View Rule" and because of the exigencies of the situation; therefore, petitioner's constitutional rights were not violated and the Arkansas Supreme Court properly affirmed petitioner's conviction and a writ of certiorari should be denied.

ARGUMENT

I.

THE WARRANTLESS SEARCH AND SEIZURE CONDUCTED BY THE POLICE OFFICER WAS REASONABLE AND LEGAL UNDER THE "PLAIN VIEW RULE" AND BECAUSE OF THE EXIGENCIES OF THE SITUATION; THEREFORE, PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED AND THE ARKANSAS SUPREME COURT PROPERLY AFFIRMED PETITIONER'S CONVICTION AND A WRIT OF CERTIORARI SHOULD BE DENIED.

Respondent, at the outset, submits that petitioner raises no substantial federal question and thus establishes no basis for the granting of certiorari. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308 at 311, 23 S. Ct. 123, 47, L. Ed. 190.

The Supreme Court of Arkansas in deciding this issue relied solely on prior decisions of this Court. The only issue raised by petitioner is whether or not, under the facts of the cases, there existed sufficient facts to establish probable cause to support a warrantless search and seizure. Both the trial court and the Supreme Court of Arkansas found such facts and have held adversely to petitioner. As stated by this Court in *United States v. Johnston,* 268 U.S. 220 at 227, 45 S. Ct. 496, 69 L. Ed. 925 (1924), "We do not grant a certiorari to review evidence and discuss specific facts."

Respondent would also submit that the Arkansas Supreme Court was not called on in this case to determine the constitutionality of a seizure because the articles seized from petitioner's possession and testified to below were in

plain view both when they were discovered and when seized by law enforcement authorities.

The plain view doctrine has enjoyed a long life extending back to *United States v. Lee,* 274 U.S. 559, 71 L. Ed. 1202 (1927). The existence of the doctrine was once again affirmed in *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L. Ed. 2d 564 (1971), where this Court stated, "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." 403 U.S., at 465, 29 L. Ed. 2d, at 582. See also Annot., 29 L. Ed. 1067 (1971).

Generally stated, "[u]nder this doctrine, the observation of objects in 'plain view' has been regarded as distinct from a 'search' for purposes of the Fourth Amendment's prohibition against 'unreasonable searches and seizures,' and it has been held that at least under certain circumstances, objects falling in the 'plain view' of a law enforcement officer who has the right to be in the position to have that view are subject to seizure and may be introduced in evidence." Annot., *supra,* at 1068.

The initial requirement which must be met under the doctrine appears to be that the officer seizing the evidence sought to be admitted in a constitutionally supportable position to view the article seized. "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion . . ." *Coolidge,* supra, 403 U.S., at 466, 29 L. Ed. 2d, at 583. See also *Harris v. United States,* 390 U.S. 234, 19 L. Ed. 2d 1067 (1968), and *Ker v. California,* 374 U.S. 23, 10 L. Ed. 2d 726 (1963).

Trooper Hale had received by radio transmission the description of the automobile (T. 32, 69, 78), its occupants (T. 32, 78) and apparently knew the general type of mer-

chandise suspected to have been taken, since he was aware that the alleged theft had taken place at Olga's Fabric and Fashions (T. 68). Accordingly, respondent urges that Trooper Hale of the Arkansas State Police had probable cause to stop the vehicle, and consequently, his observation of the merchandise lying on the floorboard of the vehicle was the result of a constitutionally permissible intrusion, here considering the detention of the vehicle as the intrusion.

Several cases have made it clear that a prior valid intrusion taken by itself does not, however, justify seizure of an article, absent exigent circumstances requiring immediate action to preserve the integrity or the existence of the evidence sought to be seized. See e.g., *Coolidge, supra*; *McDonald v. United States,* 335 U.S. 451, 93 L. Ed. 153 (1948); and *Ker,* supra.

In *Ker* this Court upheld a warrantless search and seizure of evidence because of such exigent circumstances. Specifically, this Court ruled that police officers had valid reason to take the immediate action of entering the defendant's home and seizing the evidence (marijuana) because of the likelihood that such evidence would either be distributed or hidden before a warrant could be obtained. See also *Warden v. Hayden,* 387 U.S. 294, 18 L. Ed. 2d 782 (1967) where this Court upheld the entry into suspect's house and a subsequent warrantless search and seizure of evidential items because "[u]nder the circumstances of this case, 'the exigencies of the situation made that course imperative,'" *Warden,* supra, 387 U.S., at 298, 18 L. Ed. 2d, at 787; citing *McDonald v. United States,* 335 U.S., at 456, 93 L. Ed., at 158. cf. *Hester v. United States,* 265 U.S. 57, 68 L. Ed. 898 (1923).

Respondent takes the position that the circumstances of the instant case clearly fall within the purview of the meaning of the term "exigent circumstances" as propounded by this Court in *Ker* and *Hayden, supra.*

The property sought to be seized was being transported in an automobile traveling on a public highway and could readily be removed from the jurisdiction before either an arrest warrant or a search warrant could be obtained. As in *Hayden,* supra, the officers in the instant case were in hot pursuit with the realization of the likelihood or, at least, the possibility, that both the suspects and the evidence would soon disappear.

The factual situation dealt with by this Court in *Coolidge* and relied upon by petitioner is clearly distinguishable from that of the case at hand. This Court in *Coolidge,* supra, while approving *Warden* and *Ker,* noted that in the fact situation then at hand police officers knew the location of the defendant's car and had rendered it immobile by surrounding the house with police. Consequently, this Court declared unconstitutional the subsequent warrantless seizure and search of the vehicle, noting "[t]he limits on the doctrine [of plain view] are implicit in the statement of its rationale. The first of these is that plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search of seizure *absent 'exigent circumstances.'* " 403 U.S., at 468, 29 L. Ed. 2d, at 584 [Latter emphasis supplied].

This Court in *Coolidge* went on to say:

"The underlying rationale of *Carroll* [*v. United States,* 267 U.S. 132, 69 L. Ed. 543 (1924)] and of all the cases

that have followed it is that there is 'a necessary difference between a search of a store, dwelling house or other structure in respect of which proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile, for contraband goods, where *it is not practicable to secure a warrant* because the vehicle can be quickly moved out of the locality, or jurisdiction in which the warrant must be sought.' 267 U.S., at 153, 69 L. Ed. at 551, 39 ALR 790. (Emphasis supplied.)

"As we said in *Chambers,* supra, at 51, 26 L. Ed. 2d at 428, 'exigent circumstances' justify the warrantless search of 'an automobile *stopped on the highway,*' where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.' [T]he opportunity to search is fleeting .... (Emphasis supplied)" 403 U.S., at 459, 460, 29 L. Ed., at 579.

Respondent takes the position that the effective "seizure" of the evidence in the instance cause took place when Trooper Hale, upon observing the merchandise in plain view on the floor of the car, detained the car and had petitioner drive the car back to the Sheriff's Department, approximately one and one-half miles away. The seizure was completed when Trooper Hale and Deputy Sheriff Pitts removed the bags in question from the car and took them to the Sheriff's Department.

Even if the seizure is deemed to have occurred at the Sheriff's Office shortly after the detention of the car and its occupants, *Chambers v. Maroney,* 399 U.S. 42, 26 L. Ed. 2d 419 (1970) is controlling. In *Chambers,* police officers

made warrantless arrests of four occupants of a station wagon. The station wagon was subsequently taken to a police station where the occupants were removed and a warrantless search of the car was made, resulting in the seizure of evidence. In upholding the search of the vehicle and the admissibility of evidence so procured, this Court noted that "[o]n the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured." *Chambers*, supra, 399 U.S., at 52, 26 L. Ed. 2d, at 428-429.

Respondent submits that in the instant cause the controlling cases are *Chambers* and *Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543 (1924).

Carroll stands for the proposition that ". . . contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant. . . ." 267 U.S., at 153, 69 L. Ed., at 551.

Of course, ". . . the seizing officer [must] have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." 267 U.S., at 156, 69 L. Ed., at 552.

Respondent reiterates that such probable cause on the part of Arkansas State Police Trooper Hale was shown by testimony on behalf of the State below; and that State Trooper Hale, due to information provided him by Grant County Sheriff Deputy Pitts, had a sufficient description

of the automobile and its occupants to justify their detention on the open highway.

Carroll, of course, has not gone unnoticed by the Arkansas Supreme Court, which has placed explicit reliance on its rationale on numerous occasions. See e.g., *Tygart v. State,* 248 Ark. 125, 451 S.W. 2d 225 (1970), cert. denied, 400 U.S. 807, 27 L. Ed. 2d 36; *Moore et al. v. State,* 244 Ark. 1197, 429 S.W. 2d 122 (1968), cert. denied, 393 U.S. 1063, 21 L. Ed. 2d 705 (1968); *Burke v. State,* 235 Ark. 882, 362 S.W. 2d 695 (1962). Cf. *Mann v. City of Heber Springs,* 239 Ark. 969, 395 S.W. 2d 557 (1965), which, while not citing *Carroll* specifically, found *Burke,* supra, to be determinative; *Scott v. State,* 249 Ark. 967, 463 S.W. 2d 404 (1971); and *Johnson v. State,* 249 Ark. 208, 458 S.W. 2d 409 (1970).

It should also be noted that the validity of the seizure in any particular case is not grounded upon an incident arrest or even the right to arrest:

> "In the case of vehicles, the validity of the seizure is not dependent upon the right to arrest, but rather upon the reasonable cause the seizing officer has for the belief that the contents of the automobile offended against the law. *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925) . . . . "[other citations omitted]. *Moore et al.,* supra, 244 Ark., at 1202, 429 S.W. 2d, at 126.

If the proposition is accepted that State Trooper Hale had probable cause to detain the vehicle in question, it follows under *Carroll,* that he also was in a position to make a constitutional seizure of the articles in plain view in the vehicle. See also *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 20 L. Ed. 2d 538 (1968), where this Court

stated that "[a]utomobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. *Brinegar v. United States*, 338 U.S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949); *Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 ALR 790 (1925)." 391 U.S., at 221, 20 L. Ed. 2d, at 543.

On the basis of the foregoing, respondent submits that petitioner's reliance on his authority cited is misplaced and that the trial court did not err in denying petitioner's Motion to Suppress Evidence. Respondent also submits that the Supreme Court of Arkansas properly interpreted and applied decisions of this Court and that none of petitioner's Constitutional rights, either State or Federal, were violated.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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